IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [illegible] 43

WILLIAM J. McCARTHY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR PETITIONER

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In The

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October Term, 1967

No. 1209

WILLIAM J. McCARTHY,

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UNITED STATES OF AMERICA,

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR PETITIONER

OPINIONS BELOW.

The District Court for the Northern District of Illinois, Eastern Division, did not write an Opinion. The Opinion of the Court of Appeals for the Seventh Circuit is set forth at A. 19-27. It is as yet unreported.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 USC 1254(1). The Court of Appeals for the Seventh Circuit rendered judgment on January 10, 1968 (A. 28). It denied rehearing on February 5, 1968 (A. 28). This Court granted Certiorari on April 29, 1968 (A. 29).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.

Constitutional provisions, statutes and rules involved are the Fifth and Sixth Amendments to the Constitution of the United States (A. 30), and Section 7201 of the Internal Revenue Code (26 USC 7201; A. 31) and Rule 11 of the Federal Rules of Criminal Procedure (A. 31).

QUESTIONS PRESENTED.

1—Whether the total absence of any questioning of Petitioner by the District Court prior to sentencing as to Petitioner's understanding of the nature of the charges against him is a compliance with Rule 11 of the Federal Rules of Criminal Procedure.

2—Whether the District Court abused its discretion by entering a judgment of conviction after it knew or should have known that Petitioner did not understand the nature of the charge.

3—Whether the District Court denied Petitioner his rights under the Fifth and the Sixth Amendments to the Constitution by entering a judgment of conviction without any ground for determining that Petitioner understood the nature of the charge and that a factual basis existed for Petitioner's plea of guilty.

STATEMENT OF THE CASE.

On April 1, 1966, Petitioner was indicted in three Counts under Section 7201 of the Internal Revenue Code (28 USC 7201) for income tax evasion. Each Count charged the filing of a false and fraudulent income tax return. Counts I, II and III covered 1959, 1960 and 1961, respectively and charged additional taxes due and owing of $928.74 for 1959, $5143.70 for 1960 and $1207.12 for 1961 (A. 2-3).

Petitioner retained counsel and with counsel appeared in the District Court on three occasions. The first was at the arraignment on April 14, 1966. Petitioner's counsel, both before and after receiving a copy of the indictment, waived its reading and entered a plea of not guilty for Petitioner. In answer to the Court's inquiry as to a trial date, Petitioner's counsel stated that he didn't "contemplate any preliminary motions" because he had "already had some discussions with Mr. Galbraith" (Government counsel), and suggested a June date, which the Court "fixed at June 13, 1966" (A. 4).

On June 13th, the Government moved *ex parte* to reset the trial date from June 20th to July 15th because "of the defendant's illness". The Court inquired as to the length of trial and the Government counsel replied that "[i]t is anticipated the matter will not go to trial, according to counsel". It was thereupon continued to July 15, 1966 (A. 5).

Petitioner's second appearance with retained counsel was on July 15, 1966. At this time his counsel (Mr. Sokol) stated to the Court that he had advised Petitioner "of the consequences of a plea" and that he would now on behalf of Petitioner "like to withdraw the plea of not guilty" as to Count II and "enter a plea of guilty" to said Count. The following then ensued (A. 7-8):

"The Court: Is that satisfactory to the government?

Mr. Hughes [for the Government]: Satisfactory to the government, your Honor. The government will move to dismiss Counts 1 and 3.

The Court: There will be a disposition in regard to the other Count?

Mr. Sokol: He has just moved to dismiss Counts 1 and 3.

The Court: Not until a plea is accepted and there is a judgment thereon.

Mr. Hughes: Correct.

The Court: This is tax evasion, five and ten?

Mr. Hughes: Yes, your Honor, a maximum penalty of five years and $10,000.

The Court: Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indctment; is that true?

Defendant McCarthy: Yes, your Honor.

The Court: You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?

Defendant McCarthy: Yes, your Honor.

The Court: You understand on your plea of guilty you may be incarcerated for a term not to exceed five years?

Defendant McCarthy: Yes, your Honor.

The Court You understand you may be fined in an amount not in excess of $10,000?

Defendant McCarthy: Yes, your Honor.

The Court: Knowing all that, you still persist in your plea of guilty?

Defendant McCarthy: Yes, your Honor.

The Court: The record will show that this defendant, after being advised of the consequences of his plea to Count 2 of this indictment, persists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding.

Now, in regard to Counts 1 and 3?

Mr. Hughes: Your Honor, the government will move to dismiss them. I would also request the Court to ask whether or not any promises or threats have been made.

Mr. Sokol: No, no promises or threats.

The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?

Defendant McCarthy: No, your Honor.

The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?

Defendant McCarthy: I beg your pardon?

The Court: Has anybody threatened you to enter a plea of guilty?

Defendant McCarthy: That's right, of my own volition, your Honor.

The Court: All right. Enter a pre-trial investigation order and continue the matter until the 14th day of September. Same bond may stand.

Mr. Sokol: Thank you very much."

The District Judge never personally questioned Petitioner as to his understanding of the nature of the crime charged against him. Retained counsel for Petitioner was never asked if he had informed his client of the nature of the charge, nor did counsel volunteer such a statement (A. 7-8).

Without any further questioning, the Trial Judge accepted the Plea of Guilty to Count II and entered a finding of Guilty. The Court then dismissed Counts I and III and ordered a Pre-Sentence Investigation. The matter was set for September 14, 1966 for sentencing (A. 8).

Petitioner's third and last appearance was on September 14, 1966, the day he was sentenced. The Clerk called the case for "disposition report" on Count II, Government counsel (Mr. Galbraith) greeted the Court and immediately the following ensued (A. 9-10):

> "The Court: Mr. McCarthy, do you have anything to say prior to the time that sentence is imposed?
>
> Defendant McCarthy: I am very unhappy, your Honor, that this happened and I am sure that if it were not for my health and the things that I have gone through that it never would have happened and it is not deliberate and I am very sorry.
>
> The Court: And you, Mr. Sokol, on his behalf, have you something to say?
>
> Mr Sokol: Only this, if the Court please; I am quite aware of the fact that there has been a very thorough pre-sentence investigation made in this case. I talked to the probation officer and we have been given an opportunity to submit a good deal of material to him and I am satisfied that the Court has had an opportunity to examine it. I doubt very much that with his histor—and he has heard a good deal from me with respect to some of these mistakes —I don't know truly what I could add except to indicate that he is completely contrite.
>
> The Court: And you, Mr. Galbraith?
>
> Mr. Galbraith: Your Honor, only to this extent, as you probably recall, this was originally a three Count indictment in which the government moved to dismiss Counts 1 and 3 at the time that the defendant pled to Count 2. *The prime consideration of the*

was an understanding between the parties that all taxes, penalties and interest would be paid and I just would ask your Honor if you would incorporate some reference to that in the disposition of the matter.

Mr. Sokol: There has never been any disposition to avoid such a consequence.

The Court: I mean, the report indicates that he has ample assets for the government to attach, much in excess of the amount of owed taxes. *Well, I think that with the amount involved here that the deterrent effect of a sentence is desirable.* Because of that, the defendant will be sentenced to the custody of the Attorney General for one year and fined $2500."

Thereupon, Petitioner's counsel moved that the sentence be suspended and asked to be heard. The Court replied, "I will be happy to hear you". Counsel then spoke of the wrecking of Petitioner's physical health attendant upon a number of problems relating to his addiction to alcohol; his age of 65; his fine family he had been able to rear with the help of his wife; the help he had sought (Alcoholics Anonymous, A. 14) in order to overcome "a very, very serious physical and psychological problem" (A. 11). Counsel stated that he had supplied Mr. Sanculius (the probation officer) with "attestations of the facts" relating to Petitioner's "serious psychological problems". Thereupon the following ensued (A. 11):

"Mr. Sokol: With respect to the tax case itself, he never took one single step to delude the investigating officer from the very, very start, and this was before Counsel was in the matter. He extended—in other words, he was open and he answered all questions readily.

The Court: Yes, but his books were in such shape that it made it very difficult to—and that, in my opinion, was not inadvertent.

Mr. Sokol: I am sorry, your Honor, I did not hear the beginning.

The Court: I say that his books were in such shape in regard to this income that it made it very difficult to ascertain exactly what was owing. *In my opinion the manner in which the books were kept was not inadvertent.*"

As indicated, the Court, after making the foregoing statement, did not inquire of Petitioner about the subject. In fact, the Court did not address him at this or at any further part of the Proceeding. Counsel then observed (A. 12):

"Mr. Sokol: Your Honor, it had no reference to taxation. I would like to be heard on that, because we went into this in considerable detail."

Counsel thereupon spoke (A. 12-13) of Petitioner's neglectful method of bookkeeping, that there was nothing devious about it; that "when the investigation commenced, it zeroed in"; that "disclosure was made from the very, very first"; that at the time Petitioner "had been very, very deeply involved in a protracted drinking situation and had been in the hospital for several weeks"; that his family didn't feel that Petitioner could look out for himself; that his wife said that he would have to put himself under the jurisdiction of his brother; that Petitioner resented being treated like a little boy, and put money in a wrong bank account. Petitioner's counsel then added, "But there was never *any disposition* to deprive the United States of its due"; that Petitioner "has never acted actually in what you would call normal consequence",—that if he did, it was "like a little boy" (A. 13).

The following then ensued (A. 13):

"Mr. Sokol: Your Honor, at the age of sixty-five, particularly with this kind of situation, I am positive with all of the help that he has sought and with the—he is actually now—he is no longer his own prisoner, but he is, I think, very, very much confined in terms of the kinds of help he has sought out and I would most entreat your Honor to give him an opportunity to prove to himself as well as to the Court that the remaining years of his life can be acted out in an adult fashion rather than in the little boy behavior that has tended so much of his conduct.

The Court: I mean, if you are still a little boy at the age of sixty-six, why, there is not much time to prove whether you can become an adult.

Mr. Sokol: Your Honor, there is always something to save. If I were ninety years old and they told me I had ten days left, I would want to make those ten days something healthy rather than something sick.

The Court: Anything further?

Mr. Sokol: No, your Honor."

At this point, the probation officer requested an audience (A. 13). It was brief (A. 14):

"Officer Sanculius: Your Honor, may I say a word.

The Court Yes, Officer.

Officer Sanculius: Your Honor, I just wondered whether you had received the additional—.

The Court: Even if he had not got that pardon anything that happened that long ago *has no bearing on what I have done.*

Officer Sanculius: The other thing I had in mind, your Honor, is that I have verification that he has been attending the AA group for the past two months and his sponsor is here in Court to verify that if necessary.

The Court: Well, I assume that is unquestionably true. *I have known people to get in and out of that club, about every six months. They become a member and cease to be a member and then they become a member.*"

Petitioner's counsel then requested that the Court "try" Petitioner, that "perhaps he can indicate to the Court how much he wants to make good", to which the Court replied that he was "sure that he does"; that every one "confronted" as Petitioner here "has that desire" (A. 14). The following then ensued (A. 14-15):

"Mr. Sokol: He did not act in contemplation of avoiding taxation. That was a natural consequence of what can best be described as gross neglect, and criminal neglect, if you please. *I could not have, in good conscience, recommended that he go into a plea if I did not feel that neglect has become criminal when it reaches a certain stage.* But this was not a part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return that—

The Court: It took plave over a series of four years, didn't it, Counsel?

Mr. Sokol: No, your Honor, because the real problem related to the matter of his avoiding the accountability not to his government but to the matter of the spending money.

The Court: Well, *I am sure that if the government had not stepped in, why, it would have lasted over a period of eight years.*"

Other than the stay-of-execution colloquy (A. 16), the following concluded the hearing (A. 15-16):

"Mr. Sokol: No, he had already done this, apart from the fact that he had sought help with respect to the drinking, apart from the fact that he had sought help with respect to the psychiatric

problem, and apart from the fact that he had already, so to speak, contained himself, he did, in addition, seek out the help of Mr. Abraham Angram, my associate counsel in the case, who was guiding him and he was on the right path. No, he had—I want to point out to the Court that this has occurred. This is fait accomplie. There is no aspect of his existence right now where he has not said, 'I am wrong and I need guidance and I will do what somebody else says.'

So whether it relates to the matter of drinking, he is with AA; if it relates to the matter of religious discipline, he has put himself very, very closely on a day to day and week to week responsibility arrangement.

Mrs. McCarthy is here and can testify to the fact that the idea of accountability is very, very much more in his picture. The big thing, I think, is that so far as accountability to his government is concerned, *that before this indictment took place,* he had already put himself into Mr. Angram's hands. It was through Mr. Angram that a number of these things were crystallized, and they were submitted.

The Court: *All right, the sentence heretofore entered is not vacated;* a year in the custody of the Attorney General and $2,500 fine."

SUMMARY OF ARGUMENT.

Certain facts appear from the record which are beyond dispute. These facts the Government has not, and indeed cannot, put in issue.

(1) The Petitioner was never personally questioned by the Trial Judge as to Petitioner's understanding of the crime charged against him.

(2) Petitioner's counsel was never asked if he had informed his client of the nature of the charge, nor did counsel volunteer such a statement.

Rule 11 of the Federal Rules of Criminal Procedure requires that the Trial Judge address the defendant personally and determine that the plea is made with understanding of the nature of the charge. The state of the facts as of July 15, 1966, the date on which the plea was offered and accepted, is uncontroverted. From these facts, it is crystal clear that the Trial Judge did not follow the procedure set down in Rule 11.

The Judge did not, prior to accepting the plea, nor at any other time, question the Petitioner personally and determine that Petitioner understood the charge.

In short, if Rule 11 means what it says, this conviction should be reversed.

Rule 11 was violated in another respect. The Rule, as amended, also requires the District Court to determine that a *factual basis* exists for the *plea*. This Amendment is one more facet of the District Court's duty carefully to inquire into the facts *behind* a guilty plea. In the present case, the Petitioner, in his last words to the Court before

being sentenced, said, "It is not deliberate." Petitioner's counsel then said the conduct was gross negligence which "becomes criminal." In spite of these clear signals of lack of criminal intent, the District Court made no further inquiry.

This state of facts as of September 14, 1966 the date on which Judgment was entered, is, again, clear and uncontroverted. From these additional facts, it is clear that the District Court again failed to follow the procedure set down in Rule 11. The Court, in spite of the warning signals, did not adequately determine that a *factual basis* existed for the *plea of guilty.*

The District Court's omissions in this case, moreover, not only fail to meet the requirements of Rule 11, but also amount to a violation of the defendant's rights under the Fifth and Sixth Amendments to the United States Constitution.

The Sixth Amendment requires that a defendant ". . . be informed of the nature and cause of the accusation . . ." In the present case, there is serious question whether the District Court communicated with the Petitioner so that the accused understood the nature of the accusation.

In addition, the Seventh Circuit appears to require the Petitioner to establish on appeal that he did not understand the charge and that he was prejudiced. This is contrary to the clear requirement that the Government must show that the *District Court* established Petitioner's personal understanding of the charge. This shifting of burden, if true, deprives Petitioner of his liberty without due process, contrary to the requirements of the Fifth Amendment.

ARGUMENT.

I.

THE DISTRICT COURT FAILED TO COMPLY WITH THE MANDATORY PROVISIONS OF RULE 11 IN ACCEPTING PETITIONER'S PLEA OF GUILTY.

A.

The Court Failed To Inquire Of Petitioner Personally Whether He Understood The Nature Of The Charge.

The Court accepted Petitioner's plea of guilty to Count II on July 15, 1966. It was a short and rather summary proceeding (A. 6-8).

Not a word in the record there shows any inquiry by the Court as to whether Petitioner understood the nature of the charge. Not a word even shows that Petitioner's counsel had informed him of its nature.

The Court only inquired whether Petitioner wanted to enter a plea of guilty in view of the fact that, by that plea, Petitioner was waiving his right to a jury and was subject to the statutory penalties, which the Court stated. The Court then asked Petitioner if, with such knowledge, he still persisted in his plea. Petitioner answered affirmatively. Thereupon the Court recited (A. 8):

> "The record will show that this defendant, after being advised of the consequences of his plea . . . persists in his plea. The plea will be accepted. There will be a finding of guilty in the manner and form as charged in Count 2 of this indictment, judgment on that finding."

Nothing here about whether Petitioner had been advised of the *nature* of the *charge*—only of "the *consequences* of his *plea.*"

Thereupon the Court inquired as to Counts I and III. The Government moved to dismiss them, requesting the Court to ask whether any promises or threats were made. The Court addressed the question to Petitioner who replied in the negative, stating that the plea was entered "of my own volition". The Court then entered a pre-trial investigation order and the matter was continued (A. 8).

Rule 11 of the Federal Rules of Criminal Procedure in effect now and at the time of the acceptance of the plea of guilty and judgment thereon, provides as follows (italicized language added by Amendment effective July 1, 1966):

> "A defendant may plead not guilty, guilty or, with the consent of the Court, *nolo contendere.* The Court may refuse to accept a plea of guilty, and shall not accept *such* plea . . . without first *addressing the defendant personally* and determining that the plea is made voluntarily with understanding of the nature of the charge *and the consequences of the plea.* If a defendant refuses to plead or if the Court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. *The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.*"

This Court's Advisory Committee on Criminal Rules, in drafting the Amendment, felt it necessary because:

> "The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small num-

> ber go to trial. See United States Attorneys Statistical Report, Fiscal Year 1964, p. 1. The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts."

Advisory Committee Notes, 18 USCA, Criminal Rule 11, 1967 Pocket Part, p. 133.

As the sentencing hearing of September 14, 1966 clearly indicates, the "prime consideration" for the plea of guilty to Count II and the dismissal of Counts I and III "was an understanding between the parties that all taxes, penalties and interest would be paid". After saying this, Government counsel asked the Court to make a reference to it "in the disposition of the matter". Thus in effect a bargain was reached. "Discussions" had been going on with the Government prior to the arraignment on April 14, 1966 (A. 4). *A fortiori*, it was the duty of the Court to address Petitioner personally, to make certain that Petitioner understood the nature of the charge and had not bargained away any of his rights in reaching an accord with his Government.

In speaking of the three changes made in the second sentence of Rule 11 by the Amendment, the Advisory Committee said:

> "The first change makes it clear that before accepting . . . a plea of guilty . . . the court must determine that the plea is made voluntarily with understanding of the nature of the charge. The second change *expressly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge.* The reported cases reflect some confusion over this matter (citations omitted).

> "The third change in the second sentence adds the words 'and the consequences of his plea' to state what clearly is the law." (citations omitted). (Advisory Committee Notes, 18 USCA Criminal Rule 11, 1967 Pocket Part, p. 134.) (Italics ours).

In the present case, no amount of words or citation of authority can alter the simple, inescapable fact that the Court did not address the defendant personally "in the course of determining that the plea is made voluntarily *and with understanding of the nature of the charge*", as the second change in the Rule *expressly* required the Court to do.

When we come to the sentencing hearing of September 14, 1966, the Court asked Petitioner *one and only one* question before sentence was imposed: Did Petitioner have anything to say prior thereto? Petitioner replied:

> "I am very unhappy, your Honor, that this happened and I am sure that if it were not for my health and the things that I have gone through that it never would have happened and *it is not deliberate* and I am very sorry." (A. 9).

Without questioning Petitioner further, the Court asked Petitioner's counsel and Government counsel if they had "something to say". He received their brief replies, observed that because of "the amount involved here .... the deterrent effect of a sentence is desirable", and *immediately* fixed that sentence at one year and $2500.00 (A. 10). No one seemed particularly interested in Petitioner's plaintive plea about his health, his addiction, and that what he had done was "not deliberate". It evoked no inquiry by the Court.

The colloquy that followed the motion of Petitioner's counsel to suspend the sentence (A. 10-15) raised many

questions of Petitioner's criminal intent necessary to sustain the charge: "There was never any disposition to deprive the United States of its due"; Petitioner's "neglectful method of bookkeeping", which the Court said "was not *inadvertent*" (did this make it criminal); and particularly the statement of Petitioner's counsel that Petitioner "did not act in contemplation of avoiding taxation", but that his acts were "gross neglect and criminal neglect", that he (counsel) would not have pleaded Petitioner guilty if he "did not feel that neglect has become criminal when it reaches a certain state". (A. 14). Might not counsel have been mistaken? On whom lay the duty to determine criminality? What was the purpose of the Amendment if not to protect a defendant from the good-faith errors of his counsel?

But the Court was unmoved by all of this. Not only did he fail to address Petitioner about anything on the motion to suspend the sentence, he refused an earnest entreaty of his counsel to hear Petitioner and his wife, gave short shrift to Probation Officer Sanculius, and refused to hear Petitioner's AA sponsor whom Officer Sanculius had brought to Court.

Opinion of Court of Appeals

The Court of Appeals said three issues were raised (A. 19-20):

> (1) "[W]hether the plea of guilty was accepted in accordance with rule 11 of the Federal Rules of Criminal Procedure";
>
> (2) "[W]hether the court abused its discretion in entering judgment after it allegedly knew or should have known that defendant did not understand the nature of the charge";

(3) "[W]hether the court denied defendant his rights under the fifth and sixth amendments to the constitution by entering judgment without any basis for a determination that the defendant understood the nature of the charge."

The Court of Appeals, after mentioning the indictment charges and the arraignment of April 14, 1966, then quoted almost *verbatim* (A. 20-22) the hearing of July 15, 1966, at which the plea of guilty to Count II was accepted (A. 22). Citing its own cases (*Rizzo* and *Lowe*), decided *before* the Amendment, it held that the District Court had "satisfied the requirements" of Rule 11 as amended, stating that it was "clear the district judge . . . had these recent changes in mind as the contents of his remarks and questions to defendant indicated" (A. 22).

The Court of Appeals arrived at this conclusion after paraphrasing Petitioner's argument as to the effect of the three changes in Rule 11 thusly (A. 22):

> "First, they say that a judge is now *required* to address the defendant *personally*. Secondly, they say a judge is now required to 'determine from his personal interrogation of defendant that he understands the consequences of the plea', and thirdly the court must determine that there is a factual basis for the plea."

But Petitioner's Brief directly quoted the Advisory Committee Notes (CCA Brief 12-13) (again quoted in this Brief, *ante*, pp. 15-17) and *specifically stated and argued* that the District Court "Failed To Personally Address Defendant To Determine If He Understood The Nature Of The Charge" (CCA Brief 19).

In a case such as this, where *not one question was addressed to Petitioner by the District Court* (or anyone else) before (or *even after*) the acceptance of the plea, *inquiring as to Petitioner's personal knowledge of the nature of*

the charge, we have difficulty discerning the record basis for the "clear" conclusion drawn by the Court of Appeals, to the effect that the District Court "had these recent changes in mind," at the time he accepted the plea.

The More Persuasive Authorities Support Petitioner's Position As To The Meaning Of Rule 11.

The question here is whether Rule 11 means what it says. The Seventh Circuit interprets Rule 11 as though it had been further amended by the words "but not when there is competent counsel present". We draw this from its concluding observation (A. 26):

> "We make the general observation that defendant was represented by *retained competent counsel, who was not confused and did not misunderstand the indictment charge and the consequences of the plea of guilty.* See *United States* v. *Hetherington,* 7 Cir. 279 F. 2d 792 (1966)." (Italics ours)

The question is not what counsel understood; it is what Petitioner understood. Rule 11 must be followed whether the defendant is represented by retained counsel, *United States* v. *Davis,* 212 F. 2d 264 (C.A. 7, 1954), represented by Court-appointed counsel, *Kadwell* v. *United States,* 315 F. 2d 667 (C.A. 9, 1963), or waives counsel, *Heiden* v. *United States,* 353 F. 2d 53 (C.A. 9, 1965). *Halliday* v. *United States,* 380 F. 2d 270 (C.A. 1, 1967) considered this point at some length. The Court said, at p. 272:

> "The Government cites no case holding that the facts that the defendant had heard the Indictment and certain testimony, and was represented by counsel, in themselves form a sufficient basis for the requisite findings. Something more is needed. See *Domenica* v. *United States,* 1 Cir., 1961, 292 F. 2d 483; *Gundlach* v. *United States,* 4 Cir., 1958, 262 F. 2d 72, Cert. denied 360 U.S. 904, 79 S. Ct. 1283, 3 L. Ed. 2d 1255. *To the extent that United States* v. *Hetherington,* 7

Cir., 1960, 279 F. 2d 792, Cert. denied, 364 U.S. 908, 81 S. Ct. 271, 5 L. Ed. 2d 224, *may be thought to suggest the contrary, we disagree.* We may concede that there was nothing to indicate that the defendant *was not* acting voluntarily and with full understanding. This did not satisfy the rule. *The rule imposed a burden of inquiry, Julian* v. *United States,* 6 Cir., 1956, 236 F. 2d 155. Although the circumstances suggested no negative finding, they did not warrant an affirmative one." (Italics ours)

The Seventh Circuit cited *Hetherington* as controlling the present case (A. 26), but *Halliday* expressly rejected *Hetherington's* rationale. *Halliday* specifically held that Rule 11, even prior to the 1966 Amendment, imposed a *duty of inquiry* upon the District Court. The Sixth Circuit reached the same conclusion as to a duty of inquiry in *Fultz* v. *United States,* 395 F. 2d 404 (C.A. 6, 1966).

Since the presence or absence of counsel is not controlling, what is determinative of the present case? Rule 11 furnishes the answer, namely, the District Court must question the defendant personally to establish his understanding of the nature of the charge.

The leading case is *Munich* v. *United States,* 337 F. 2d 356 (C.A. 9, 1964). It dealt with the duties of a District Court when accepting a plea of guilty. The case was considered by the Advisory Committee to be so important as to support the Amendment of Rule 11. It is a pre-Amendment Case; but, since the Amendment adopts its rule, the Case is authoritative.

The facts in *Munich* parallel those at bar on this critical issue. Munich was charged with violations of the narcotic law. He retained counsel, who entered a plea of not guilty to each of the eight counts in the Indictment. At a later hearing, while still represented by retained counsel, Mu-

nich withdrew his plea of not guilty and entered a plea of guilty. No appeal was taken. Eighteen months after the sentencing, a motion to vacate was filed. An appeal was taken from denial of that motion. The Ninth Circuit (sitting *en banc*) reversed the denial of the motion to vacate and remanded the case for trial. In so doing, it established clearly what duties the District Court had at the time of accepting a plea of guilty..

It held that there are two fact questions which the District Court must determine before accepting a guilty plea. First, the District Court must determine that the plea is made voluntarily; and second, *the District Court must determine that it is made with understanding of the nature of the charge.* The Ninth Circuit further held that three elements are necessary before the District Court can be satisfied that a Defendant understands the nature of the charge; namely, (1) the meaning of the charge, (2) what acts are necessary to establish guilt, and (3) the consequences of pleading guilty to the charge. (357 F. 2d 356, 359).

In *Munich,* the Defendant was directly asked if he understood the charge. The Defendant responded, "Yes, I do." (337 F. 2d 356, 360). The Ninth Circuit held that this interrogation was not enough. It also noted that the District Court did not ask Munich's retained counsel, who was present, whether he had advised his client of the nature of the charge. The Court held that, in the absence of any assurance from counsel, a defendant's affirmative answer that he understands the charge does not provide a substantial basis for a determination that the Defendant understands the meaning of the charge, what acts are necessary to establish guilt, and the consequences of pleading guilty.

In 1965, the Ninth Circuit reinforced its conclusion in *Munich* by holding in *Heiden* v. *United States*, 335 F. 2d 53 (C.A. 9, 1965), that the District Court's failure to ascertain a defendant's understanding at the time of accepting a guilty plea could not be cured by a subsequent hearing or by any subsequent colloquy between Court and defendant.

Here the District Court at no point questioned the Petitioner personally as to his understanding of the nature of the charge. This omission is startling in view of the facts which came to the Court's attention particularly when Petitioner, in his only personal statement to the Court, said (A. 9), ". . . *it is not deliberate* and I am very sorry". (Italics ours)

In the course of the proceedings, the District Court also learned that Petitioner was 65 years old (A. 12). He learned that Petitioner suffered from alcoholism at the time of the offense and up to the time of entering the plea (A. 12). He learned that the Government's theory of the case was complex and that the explanation of that theory by Petitioner's counsel was even more involved (A. 12-15).

These were all warning signals, pointing up the absolute necessity of further inquiry. Yet the District Court failed to inquire further. The record in this case contains nothing which shows personal questioning of the Petitioner by the District Court (or anyone else) to establish his understanding of the nature of the charge.

B.

The Court Failed Adequately To Satisfy Itself That There Was A Factual Basis For Petitioner's Plea.

Here we speak of the last sentence of Rule 11, which was added by the Amendment and mandatorily requires that *"The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."* (A. 31). Concerning the purpose of this Amendment, the Advisory Committee said (Notes, 18 USCA, Criminal Rule 11, 1967, Pocket Part, p. 134):

> "The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, e.g. protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."

As the Notes indicate, this is an additional safeguard, for a defendant might understand the nature of the charge without realizing that his conduct came within it. Alternative methods of court inquiry are suggested by the Notes, but nothing indicates that one form is necessarily sufficient. The Court of Appeals laid great stress here upon the pre-sentence investigation report (A. 25-26). In view of the record in this case, is that enough?

The Indictment charged violations of Section 7201 of the Internal Revenue Code (A. 31). Count II alleged that the additional tax due was $5,143.70 for 1960. Under Section 7201 three elements are essential to conviction: (1)

an affirmative act constitutes an evasion or attempted evasion of the tax; (2) the existence of a tax deficiency; (3) wilfulness.

Within Section 7201, however, are at least two included offenses, namely, filing a false tax return and failing to pay a tax when due, both of which are misdemeanors. Noting the situation, this Court recently defined the crime under Section 7201 in *Sansone* v. *United States,* 380 U.S. 343 (1965) where it held that the distinguishing characteristic of Section 7201 is a wilful attempt to evade or defeat taxes. It is therefore important to note that the crime under Section 7201 demands a *specific intent.*

Clearly the charge with which the defendant was faced is a complicated one. It is in fact the "capstone" of this body of law. The possibility of confusion with lesser included offenses is great. We must therefore look carefully at what Petitioner said. The only statement made in Court by Petitioner occurred at the sentencing hearing when he said (A. 9) ". . . it is not deliberate".

The legal force of a statement such as "It is not deliberate" is not clear. But that is the whole point. Such a statement is totally inconsistent with a plea of guilty to a *specific intent crime.* Such a statement demands further inquiry. It cannot go unnoticed. Yet no inquiry was made.

Fundamental principles of criminal jurisprudence militate against the conviction of an accused for a felony based on inadvertence. In the area of taxation, the case of *United States* v. *Pechenik,* 236 F. 2d 844 (C.A. 3, 1956) defines the law as follows:

"• • • The conscious purpose to defraud proscribed by the statute does not include negligence, careless-

ness, misunderstanding or unintentional understatement of income. *Holland* v. *United States,* 1954, 348 U.S. 121, 139, 75 S. Ct. 127, 99 L. Ed. 150; *United States* v. *Murdock,* 1933, 290 U.S. 389, 54 S. Ct. 223, 78 L. Ed. 381. As was said in the latter case (290 U.S. at page 396, 54 S. Ct. at page 226):

> 'Congress did not intend that a person, by reason of a bonafide misunderstanding as to his liability for the tax * * * or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct.'" 236 F. 2d 844, 846.

These fundamental principles of criminal jurisprudence apply equally whether the offense is in the area of taxation or elsewhere. The procedures for pleas of guilty before military tribunals closely parallel the Federal Rules of Criminal Procedure. And the decisions thereunder follow the same rationale. In the case of *United States* v. *Richardson,* 15 USCMA 400, 35 CMR 372, 375-376 (1965), the defendant was charged with passing checks without funds to cover. The defendant pleaded guilty and was sentenced. Later, while conferring with a legal officer, the defendant said he had deposited checks which he had won at gambling. Those checks were dishonored. As a result, the other checks were returnd NSF. This, like Petitioner's "it was not deliberate" in the present case, went directly to the *mental state necessary to the crime charged.* The defendant there took an appeal. The Court of Military Appeals said:

> "Particularly do we advert to the fact (that) accused's plea in this case was met only with the president's barren recital of a pro forma explanation of its meaning and effect. And, the stipulations of fact into which counsel entered were, as the reviewer noted, insufficient to make out even a prima facie case of guilt * * *

we have no recourse but to conclude the circumstances require the plea to be set aside.

* * * * *

"We cannot leave this matter without referring once more to the desirability of having a full inquiry made at the trial into the circumstances of the accused's plea in order to insure he understands its legal and factual significance * * * The reliance on nothing more than a formula, the skimpy record, and the lack of any real attention to his declarations leads instead to reversal."

Counsel for Petitioner, in interpreting the acts and omissions of Petitioner said:

"Mr. Sokol: He [Petitioner] did not act in contemplation of avoiding taxation. That was a natural consequence of what can best be described as gross neglect, and criminal neglect, if you please.

I could not have, in good conscience, recommended that he go into a plea if I did not feel that neglect has become criminal when it reaches a certain stage. But this was not a part of any elaborate scheme or any devious course of conduct where he was acting in contemplation of a tax return that—

The Court: It took place over a series of four years, didn't it counsel?

Mr. Sokol: No, your Honor, because the real problem related to the matter of his avoiding the accountability not to his government but to the matter of the spending money.

The Court: Well, I am sure that if the government had not stepped in, why, it would have lasted over a period of eight years." (A. 14-15)

Comparing the statement of counsel (A. 14-15) with the statement of Petitioner (A. 9), and with the law applicable to the crime charged, it is impossible to determine of what Petitioner conceived himself to be guilty.

Was it really enough, in determining whether there was a *factual basis* for the plea to a *specific intent* crime, that the District Court had read the pre-sentence report, strongly relied on by the Court of Appeals, however thorough it may have been? Didn't that report in fact raise more questions than it settled as regards the supposed factual basis for Petitioner's plea? Isn't it true that the report (taken together with Petitioner's "it was not deliberate" and the extended plea by Petitioner's counsel for a suspended sentence) raised a specific issue whether there was indeed a factual basis for a plea of guilty? Should not the Court have inquired further?

It is in cases such as this, where the charge is complex, that close adherence to procedural rights is most important. Recognizing this duty, Judge Parsons, District Judge for the Northern District of Illinois, in *Cerniglia* v. *United States*, 234 F. Supp. 932, 945, said:

> "• • • The extent to which a Court must inquire as to the *factual basis* for a plea of guilty will vary from case to case. In cases where the charge involves *complicated facts*, such as conspiracy in a scheme to defraud a bank, *the Judge should inquire further to determine whether the defendant, in conversation with his attorney, had discussed possible factual and technical defenses, e.g.*, Statute of Limitations • • •" (Italics ours)

In many respects the zeal with which a Court adheres to regulations imposed for the safeguarding of fundamental rights determines the total quality of justice throughout a society. In a period when great pressures are brought to bear upon the District Court to speed up the processing of cases, close and careful adherence

to procedural rules in criminal cases may create problems; but formalities constructed by recognized rules for the protection of Constitutional rights are substantial and indispensable. In this regard, "delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure." *Duke Power Co. v. Greenwood Co.*, 299 U.S. 259, 268 (1936).

II.

THE DISTRICT COURT'S JUDGMENT OF CONVICTION, MOREOVER, VIOLATES PETITIONER'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION.

A. The Sixth Amendment

The Sixth Amendment requires that a defendant ". . . be informed of the nature and cause of the accusation". (A. 30). In the present case, there is absolutely no indication in the record that Petitioner was ever personally informed of the nature of the charge against him. This violates Petitioner's rights, under both the Fifth and Sixth Amendments.

On a number of occasions this Court has been faced with the question of whether or not Sixth Amendment guarantees are a part of the due process protection. The uniform result, on the question of the right of an accused to know the charge, is that the most fundamental element of due process is ". . . real notice of the true nature of the charge against him . . ." *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941).

In the present case, the Seventh Circuit refers to the Constitutional argument but does not answer or decide it

(A. 20). The Seventh Circuit seems to believe that this is obviated by the fact that Petitioner had counsel and by the fact that the District Court read the pre-sentence investigation report.

However, the presence or absence of counsel has nothing to do with the error which occurred when the guilty plea was tendered and accepted. No matter how competent and knowledgeable Petitioner's counsel was, his knowledge and understanding are not the point. It is the knowledge and understanding of Petitioner, the accused, which is the critical question.

Moreover, the District Court's perusal of the pre-sentence report cannot cure the defect. Error occurred when the plea was tendered and accepted. At that point, the District Court had *not* established Petitioner's personal understanding of the charge. Nothing that happened thereafter could cure that defect. The pre-sentence report, taken together with Petitioner's "it was not deliberate," actually *compounded* the error.

The case of *Hulsey* v. *U. S.*, 369 F. 2d 284 (C.A. 5, 1966), presents a situation similar to the instant appeal. In that case an admitted alcoholic was charged with the interstate transportation of forged securities with fraudulent intent. The defendant pleaded guilty to endorsing the securities; and, upon questioning by the Judge, stated that he recognized the endorsement as his own but could not remember whether the securities in question were forged or not because he had been drinking heavily and could not account for his behavior. The Trial Court accepted the plea, entered judgment, and sentenced the defendant. An appeal was perfected. The Court of Appeals reversed the decision and stated:

"Pleading guilty to the mere endorsement of an instrument, while disclaiming any knowledge of whether it was forged, even aided by the strongest presumption of appellant's comprehension of the offense charged, cannot be viewed as tantamount to an unconditional assertion of guilt to the fraudulent interstate transportation of a forged security with knowledge of the forgery. If anything, such response appears more closely akin to a protestation of innocence than an expression of guilt. It would have been a simple matter for the trial court, when confronted with such equivocal response, to delay accepting the plea until further inquiry clearly established that the accused understood the elements of the crime charged in the information and was willing to enter an unequivocal admission of guilt. See *Kreuter* v. *United States,* 10th Cir. 1952, 201 F. 2d 33. On the other hand, if after being fully apprised of the nature of the charge and the consequences of his plea, the accused persisted in attempting to enter a qualified plea, the trial court should have refused to accept it and set the case for trial. *State* v. *Stacy,* 1953, 43 Wash. 2d 358, 261 P. 2d 400; *People* v. *Morrison,* 1957, 348 Mich. 88, 81 N.W. 2d 667, cf. *Bergen* v. *United States,* 8th Cir., 1944, 145 F. 2d 181. Nothing we have said is intended to suggest that the acceptance of a plea of guilty which merely fails to comply with precise ceremonial or verbal formality will necessitate the setting aside of an otherwise valid conviction and sentence. See *United States* v. *Cariola,* 8th Cir., 1949, 177 F. 2d 505. We are convinced, however, that a fundamental requisite of a plea of guilty is that it manifest an unequivocal and knowledgeable admission of the offense charged and should not be accepted if so limited or conditioned that it constitutes, as in the instant case, little more than an ambiguous expression of qualified guilt coupled with a protestation of innocence. To require that a plea of guilty

which, when accepted by the court, in itself constitutes a conviction no less conclusive than the verdict of a jury, must manifest an unqualified admission of the offense charged, is not to exalt form over substance nor to place a premium upon mere technical verbiage; it is merely to implement a fundamental requirement of due process essential to the fair and just administration of the criminal laws. 369 F. 2d 284, 287."

B. The Fifth Amendment

The Seventh Circuit appears to require the Petitioner to prove that he did not understand the charge against him. This is contrary to the clear requirement of Rule 11, namely, that the Court must establish Petitioner's personal understanding of the charge. And, on the Appeal to the Seventh Circuit, the burden was on the Government to show that the Court had done this. The Seventh Circuit's statement seems to shift this burden to Petitioner. Neither precedent nor public policy can be shown to require that Petitioner shoulder that burden. Indeed, if Petitioner must lift that bale, the Sixth Amendment guarantee means nothing. If Petitioner is put to such a task, particularly in view of the District Court's non-compliance with Rule 11, then the presumption of innocence is reversed.

CONCLUSION.

Rule 11, as amended effective July 1, 1966, is like a compass on a boat. In this vital area of acceptance of a plea of guilty, it points the course to "equal justice to all in the federal courts". If variations or deviations result from vague and fluid phrases such as "the district court *satisfied* the requirements" of the rule of "reasoning in *substantial* accord . . ." therewith (A. 23), dead-reckoning determines our course and the vagaries of the sea and of the man at the helm determine our destination.

We have lately come to appreciate the wisdom of our ancestors, particularly in the field of the administration of criminal justice. Indeed, it would be superfluous to marshall the recent landmark cases involving procedure, too long treated as gossamer: "mere technicalities", "matters of form". For over seven centuries prior to the dawn of this "enlightened" one, remedies breathe life into rights.

And while, as Holmes put it, the seventeenth century common law had been unable "to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert" (*Paraiso v. United States*, 207 U.S. 368, 372, Harlan J. dissents), the paramount truism is that *"The history of liberty has largely been the history of observance of procedural safeguards"*, (per Frankfurter, J. in *McNabb v. United States*, 318 U.S 332, 347). The learned Justice added immediately in concluding (*id.*, at p. 347):

"And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law".

For after all is written and said, the District Court did not address Petitioner *personally* to determine if Petitioner's plea was made *"with understanding of the nature of the charge"*, either before or after accepting Petitioner's plea.

Only by abiding by the letter of Rule 11, can you give its spirit life. That spirit was to lay at rest for all future time the gnawing feeling that defendants in the past had pleaded guilty without really "understanding the nature of the charge"; or, in more blunt terms, whether they knew they were in fact legally guilty.

Because of the premises, it is respectfully submitted that the judgment be reversed and the cause remanded for further proceedings conformably to law.

Respectfully submitted,

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